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In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH J.C. DICARLO AND RONALD C. MACKENZIE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 575 F. 2d 952. The opinion of the district court (Pet. App. 17a-31a) is not published.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1978. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to June 19, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' trial counsel had a conflict of interest that deprived petitioners of the effective assistance of counsel.

2. Whether the government improperly withheld exculpatory evidence.

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioners, former members of the Massachusetts State Senate, were convicted of extortion affecting interstate commerce, in violation of 18 U.S.C. 1951; of using the facilities of interstate commerce for the distribution of the proceeds of an unlawful activity, in violation of 18 U.S.C. 1952; and of conspiracy, in violation of 18 U.S.C. 371, 1951, and 1952. Petitioners received concurrent one-year terms of imprisonment on each of the substantive counts and a two-year suspended sentence on the conspiracy count; they were each fined $5,000. The court of appeals affirmed (565 F. 2d 802) and this Court denied certiorari (No. 77-990, March 20, 1978).

The evidence underlying petitioners' conviction was outlined by the court of appeals (565 F. 2d at 803-804). Briefly, the evidence showed that petitioners extorted $40,000 from McKee-Berger-Mansueto, Inc. ("MBM"), a New York company that had been selected to manage the construction of the campus of the University of Massachusetts at Boston. Petitioner DiCarlo was the chairman and petitioner MacKenzie the ranking minority member of a committee of the state legislature formed to investigate cost overruns and other practices by MBM. Petitioners extorted the payments through threats of adverse committee recommendations. After the payments, the committee report recommended no action be taken against MBM.

In June 1975, a year before any indictments were returned, DiCarlo was informed by Massachusetts Senate President Harrington that DiCarlo was the object of a federal investigation. Harrington recommended that DiCarlo hire an attorney, Walter Hurley, a noted

Massachusetts defense lawyer and associate of Thomas Joyce. Petitioners knew Joyce to be a prominent lobbyist whose political contacts included Harrington and former Governor Sargent. Joyce was also reputed to have a source of information in the Department of Justice in Washington that would enable him to inform Hurley on the progress of the government's investigation against DiCarlo. Thus, Joyce later informed Hurley that MacKenzie was also under investigation. DiCarlo thereafter relayed this information to MacKenzie and urged MacKenzie to retain attorney Robert *v.* Mulkern, who, although not a member of Joyce's firm, was willing to cooperate in a joint defense. Because of DiCarlo's urgings, MacKenzie retained Mulkern (Pet. App. 4a-5a).

On the sixth day of petitioners' trial, while MBM president McKee was on the stand, the prosecutor gave defense counsel copies of FBI reports in which McKee and other MBM officers had admitted making payments to other Massachusetts potiticians, including $2,000 to Senate President Harrington and two payments of $5,000 each to Albert Manzi, at least one of which was purportedly a political contribution to then Governor Sargent. During a recess, Hurley and Mulkern sought their clients' advice on whether this information should be used for their defense. DiCarlo replied"if it's helpful. Bring it out. Withhold nothing" (see Pet. App. 5a, 29a).

When the trial resumed, "defense counsel pressed the question of MBM's political contributions at every stage of cross-examination of MBM's witnesses, at great length and in great detail" (Pet. App. 28a) but did not allude to Harrington or Sargent as recipients of the payments. However, at no time during the remaining 16 days of trial did petitioners protest the failure of trial counsel to disclose the names of Harrington and Sargent, complain

that the subject of MBM's political payments had not been adequately explored, or in any way intimate that their attorneys were incompetent or unresponsive to their wishes.

Nine months after their trial, and while their direct appeal was pending, petitioners filed two motions for a new trial contending, *inter alia*, that they had been denied the effective assistance of counsel and that material discoverable under *Brady* v. *Maryland*, 373 U.S. 83, had been improperly withheld. After considering petitioners' affidavit and exhibits, the district court denied their motions without an evidentiary hearing (Pet. App. 17a-31a).[1] The court of appeals affirmed in a well-reasoned opinion upon which we rely (Pet. App. 1a-16a).

ARGUMENT

1. Petitioners contend (Pet. 27-57) that they were denied the effective assistance of counsel because of a conflict of interest that manifested itself when neither of their separately retained attorneys elicited at trial that Senator Harrington and Governor Sargent had been recipients of MBM payments. Under petitioners' theory, this failure deprived them of the use of a "friends in high places" defense (Pet. 45-47)[2] and evinced a primary

[1]Because their direct appeal was decided before the district court could consider petitioners' motions, the district court treated petitioners' claims (other than that of newly discovered evidence) as if properly brought under 28 U.S.C. 2255. See Pet. App. 17a-18a.

[2]Petitioners' theory is that their trial counsel should have disclosed MBM's payments to Harrington and Sargent to demonstrate that MBM had no need to bribe petitioners because MBM already possessed "friends in high places" (Pet. 45). The suggestion is that, having already purchased the favor of a governor and senate president, MBM had no motive to spend any more money to ensure a favorable report from petitioner DiCarlo's investigation committee.

motivation on the part of their attorneys to protect Harrington's and Sargent's names from disclosure because one of the attorney's associates, Thomas Joyce, had a "close relationship with Harrington and Sargent" (Pet. 40). The record, however, belies any contention that petitioners were deprived of their right to loyal and effective counsel; nor were they entitled to an evidentiary hearing to explore this claim.

First, counsel's decision not to elicit that Harrington and Sargent were recipients of MBM payments provides no support for petitioners' speculation that the decision was motivated by conflicting loyalties. Rather, that decision had a sound basis in trial strategy. As the court below recognized (Pet. App. 6a):

> [T]here were substantial risks involved in using these names which prudent counsel might very reasonably wish to avoid. The jury might have viewed the dragging of prominent figures into the case a desperate, but not exculpatory, tactic, particularly if they had responded and denied receipt.

Moreover, counsel made extensive use of the information about MBM's payments, and cross-examined MBM's witnesses "at great length and in great detail" about the company's political contributions (Pet. App. 28a), even though in so doing there was a very real prospect, as the district court noted, that "[a]t any point" those names "could have come out" and the prosecution had previously warned that it might disclose the recipient's names if the defense explored the area of other payments at all (*ibid.*). Accordingly, petitioners' bare allegation that counsel's cross-examination was aimed at protecting others besides their clients does not suffice to establish a conflict of interest, since under the circumstances of this case that was a "reasonable trial tactic" which could furnish "an equally plausible explanation [for their]

actions." *United States* v. *Johnson*, 575 F. 2d 1347, 1359 (C.A. 5). See also *Foxworth* v. *Wainwright*, 516 F. 2d 1072, 1077 n. 7 (C.A. 5).

Second, petitioners have made no plausible showing that they suffered any actual prejudice from counsel's tactics. See, *e.g.*, *Miller* v. *United States*, 564 F. 2d 103, 106-107 (C.A. 1). The claim that identification of Harrington and Sargent as other recipients of MBM's funds would have provided petitioners with a defense that MBM did not need petitioners' favor and simply paid petitioners $40,000 as "campaign contributions" (Pet. 20 n. 4) is, to put it charitably, farfetched. As the court of appeals stated (Pet. App. 6a-7a):

> [I]f it should appear that these contributions were in fact made, and illegal—there is some suggestion that the second alleged payment to Manzi was the result of raw political blackmail—it is hard to see how this would have helped persuade a jury that MBM had not been subject to, and capitulated to, similar conduct by defendants.
>
> * * *The suggestion that $2,000 purchased all-risk insurance, or that Harrington, for that amount, if requested, would have gone to DiCarlo and said, "You lay off," is not credible. Even less persuasive would be the thought that Sargent, the Republican governor, could have gone to the Democratic chairman purportedly investigating the propriety of a Republican-let contract, and said that MBM had paid enough already.
>
> * * * * *
>
> It is true that Joyce, as a lobbyist, wanted to cultivate friends with political power. Any concern for Sargent, however, would have been diminished by the fact that he was out of office by the time of trial. While he was friendly with Harrington, so he was with DiCarlo, who had already risen to a position of power. To put it crassly, we may wonder how it would improve his stature as a lobbyist if he were to sell out one senator, who was his client, for an incidental benefit to another, who was not.

Finally, petitioners were fully aware of the facts alleged to constitute a conflict at all relevant times, and it is axiomatic that a conflict of interest arises only " 'if counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents * * * are hobbled or fettered or restrained by commitments to others.' " *Castillo* v. *Estelle*, 504 F. 2d 1243, 1245 (C.A. 5), quoting, *Porter* v. *United States*, 298 F. 2d 461, 463 (C.A. 5). Petitioners, however, not only knew of Joyce's political connections but in fact retained his associates because of those connections. Furthermore, both were well aware of the facts of the alleged conflict long before the trial had ended but made no objection (Pet. App. 9a). Thus, the court of appeals correctly noted, "[n]othing was concealed from them, including in fact that day after day the trial was proceeding without their counsel disclosing the names [of Harrington and Sargent] to the jury" *(ibid.)*.[3]

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[3]There is no merit to petitioners' further claim (Pet. 31-36) that they were entitled to an evidentiary hearing on the conflict of interest allegation. Where, as here, an allegation of a prejudicial conflict of interest is "palpably incredible" or "patently frivolous," a district court is amply justified in rejecting a motion for new trial after an examination of the files and affidavits. See *Blackledge* v. *Allison*, 431 U.S. 63, 76.

Holloway v. *Arkansas*, No. 76-5856, decided April 3, 1978, on which petitioners rely is wholly inapposite. There, one lawyer was appointed to represent three defendants. The defendants and the lawyer objected to the joint representation prior to trial, advising the court that there existed an actual conflict of interest that rendered effective joint representation impossible. Here, in contrast, each petitioner retained separate counsel, there was no conflict between their interests giving rise to the risks that existed in *Holloway*, and no claim of conflict was made until after conviction.

2. Petitioners also contend (Pet. 21-26) that they were denied a fair trial because the government failed to disclose certain materials allegedly discoverable under *Brady* v. *Maryland*, 373 U.S. 83, and *United States* v. *Agurs*, 427 U.S. 97. That contention is incorrect.

Petitioners' indictment in 1976 was reported in the national press. Subsequently, in mid and late 1976, the United States Attorney received letters from the Passaic Valley (New Jersey) Sewerage Commissioners and the City and County of San Francisco (App. 234, 276) inquiring whether the government's investigation of MBM had disclosed any improprieties by that company that would reflect on their fitness for selection for future contracts. In response, the Assistant United States Attorney assigned to the case replied to each request by stating (App. 235, 241):

> Neither McKee-Berger-Mansueto, Inc., nor any of its principals in the named-captioned indictment were charged as defendants or co-conspirators. Rather, the indictment charges that MBM and its principals were the victims of an extortion scheme alleged to be perpetrated by the defendants. In response to your additional inquiry, MBM and its principals have cooperated from the outset with federal authorities in the conduct of the investigation which led to the indictment. Further, this office is not aware of any reason why MBM should be disqualified from public work.

In a pretrial motion, petitioners sought discovery of the following (Pet. 13):

> 23. All statements or promises or rewards of any kind, or tending in any way, directly or indirectly, to induce or encourage the giving of testimony, which statements have been made to any persons whom the Government intends to call as witnesses at the trial of the indictment herein.
>
> 24. All evidence of any kind favorable to the defendants material either to guilt or punishment, including without limitation that which may tend to be exculpatory, to impeach or discredit incriminatory evidence or to mitigate the crime charged, or which may lead to evidence of such character.

The prosecutor did not consider these letters to come within petitioners' request or to be relevant to their case, and the case proceeded to trial without their disclosure. At trial four MBM officers testified extensively about their meetings with petitioners.

Petitioners claim that the letters were exculpatory and should have been disclosed under *Brady* because they would have tended to impeach MBM witnesses by showing government action favorable to MBM; they also claim that Paragraph 23 of their discovery motion was a "specific request" for the letters, noncompliance with which is "seldom if ever excusable" under *Agurs*, *supra*, 427 U.S. at 106. The court of appeals correctly rejected both claims.

The letters were clearly not exculpatory and had no significant impeachment value. If the letters had been written at the request of MBM, or in consideration for the cooperation and testimony of MBM witnesses, petitioners' argument might have some colorable basis. But there is no evidence or basis for suspecting any such *quid pro quo*. The letters were written in response to inquiries from third parties and did no more than recite what was alleged in the indictment and disclosed at trial.

Petitioners' claim that Paragraph 23 was a specific request for the letters is refuted by the face of Paragraph 23, which asked for "statements [which] have been made

to any persons whom the Government intends to call as witnesses at the trial * * *" (emphasis supplied). The letters were not statements made to any witness; they were letters to third parties who had no involvement in this case. Furthermore, as noted above, there is no basis for the claim that the letters were, in the language of Paragraph 23, "statements or promises or rewards * * * tending * * * to induce or encourage the giving of testimony * * *."[4]

Petitioners err in ~~conceding~~ contending (Pet. 21-25) that the decision below conflicts with *United States* v. *McCrane*, 547 F. 2d 204 (C.A. 3). Petitioners' discussion of that case fails to address its two significant distinguishing features: in *McCrane* the letters were written at the request of the witness, through his counsel, and, in addition, the verdict there had "only slight support and 'additional evidence of relatively slight importance might be sufficient to create a reasonable doubt.' " 547 F. 2d at 207, quoting from *Agurs, supra*, 427 U.S. at 113. In those circumstances the court of appeals concluded that the letters were sufficiently material to the defense to require disclosure

[4]As the court of appeals stated (Pet. App. 13a-14a):

> * * * [T]he letters were sufficiently recommendatory that we would consider them to be "rewards" if, but only if, a statement had been made to a MBM witnesses which put them in that light. There was no impeaching significance in the letters themselves. They were not relevant unless, as the final clause of the request specified, they were intended to influence the witness. Clearly, they could not influence the witness unless there had been a statement to him, either a promise that they would be written, or, at the least, subsequent communication enabling him to realize that he had been rewarded. Not only is this clear, but the request itself, which appears carefully drawn, recognizes there would have had to have been a "statement" to the witness. The specificity of the request, in other words, related to any statement, not to the letters themselves. There is nothing to overcome the United States Attorney's response that there was no such statement. [Footnote omitted.]

even in the absence of a specific request. Whether that decision was right or wrong, the case bears no resemblance to the instant case.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]The court in *McCrane* went on to state, as an alternative ground, that the pre-trial request there, seeking "material which may be used to impeach prosecution witnesses," was a specific request for the letters at issue there within the meaning of *Agurs* (547 F. 2d at 207). While we believe that conclusion was erroneous, it is not in conflict with the decision below because (1) the reason it was deemed "specific" was the evidence (not present in this case) that the letters were written at the request of a witness's counsel, and (2) the letters were regarded as sufficiently material to require disclosure even in the absence of a specific request.